

ESTTA Tracking number: **ESTTA588958**

Filing date: **02/24/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91214512
Party	Defendant Three Brothers Brewing, LLC
Correspondence Address	DANIEL L. FITCH WHARTON ALDHIZER & WEAVER PLC 100 S MASON ST HARRISONBURG, VA 22801-4022  dfitch@wawlaw.com
Submission	Answer and Counterclaim
Filer's Name	Daniel L. Fitch
Filer's e-mail	dfitch@wawlaw.com
Signature	/Daniel L. Fitch/
Date	02/24/2014
Attachments	Three Brothers.pdf(281566 bytes )

Registration Subject to the filing

Registration No	2319407	Registration date	02/15/2000
Registrant	Two Brothers Brewing Company 30W315 Calamut Ave W Warrenville, IL 60555 ISRAEL		
Grounds for filing	The registered mark has been abandoned.		

Goods/Services Subject to the filing

Class 032. First Use: 1997/04/10 First Use In Commerce: 1997/08/09 All goods and services in the class are requested, namely: Beer
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

TWO BROTHERS BREWING COMPANY,	:	Opposition No. 91214512
	:	
Opposer,	:	
	:	
v.	:	Serial No. 86/021,014
	:	
	:	Serial No. 86/020,720
	:	
THREE BROTHERS BREWING, LLC,	:	
	:	
	:	Mark: 3 BROTHERS
Applicant.	:	Filing Date: July 26, 2013

**ANSWER AND COUNTERCLAIM**

Three Brothers Brewing, LLC (“Three Brothers”), by counsel, pursuant to 37 CFR § 2.106(b), TBMP § 311, and the Board’s Scheduling Order Mailed on January 16, 2014, provides the following Answer and Counterclaim to the Notice of Opposition filed by Two Brothers Brewing Company (“Two Brothers”). Where applicable, the numbered paragraphs below correspond to the numbered paragraphs in the Notice of Opposition.

1. Three Brothers is without sufficient information to admit or deny the allegations contained in Paragraph 1 of the Notice of Opposition concerning the ownership and founding of Two Brothers, and therefore denies the same. The remaining allegations of Paragraph 1 of the Notice of Opposition are denied.

2. Three Brothers admits that Two Brothers currently uses the trade name “TWO BROTHERS” on bottles, packaging, marketing materials, and clothing items. Three Brothers is without sufficient information to admit or deny the remaining allegations contained in Paragraph 2 of the Notice of Opposition, and therefore denies the same.

3. Upon information and belief, Three Brothers admits that Two Brothers entered its product(s) at the Great American Beer Festival in Denver, Colorado in 2013. Three Brothers is

without sufficient information to admit or deny the remaining allegations contained in Paragraph 3 of the Notice of Opposition, and therefore denies the same

4. It is unclear what is meant by “the TWO BROTHERS mark”, as set forth in Paragraph 4 of the Notice of Opposition, as that term has yet to be defined in the text of the Notice of Opposition. Moreover, the allegations in Paragraph 4 of the Notice of Opposition which assert inherent distinctiveness state conclusions of law, to which no response is required. Three Brothers has insufficient information to either admit or deny any factual allegations contained in Paragraph 4 of the Notice of Opposition, and therefore denies the same.

5. Three Brothers admits that Registration No. 2,319,407 for the logo mark pictured was registered on February 15, 2000. Three Brothers further admits that Two Brothers filed Applications Nos. 86123386 and 86123339 on November 19, 2013 for the logo mark and character mark set forth, respectively. The remaining allegations contained in Paragraph 5 of the Notice of Opposition are denied.

6. Three Brothers admits that the certificate for Registration No. 2,319,407 is prima facie evidence of its validity as well as Two Brothers’ ownership and exclusive right to use that logo mark in connection with the identified goods in commerce. As set forth in Three Brothers’ Counterclaim, Registration No. 2,319,407 is invalid by reason of abandonment. The remaining allegations contained in Paragraph 6 of the Notice of Opposition are denied.

7. Paragraph 7 of the Notice of Opposition contains no factual allegations to which a response is required. However, Three Brothers objects to any implication that Two Brothers’ Registration No. 2,319,407, its pending applications, and any limited common law rights, which Two Brothers must establish, are all valid and/or are the same mark or a continuation of the same mark. Moreover, Three Brothers denies that Two Brothers’ pending applications constitute valid

grounds for opposition to Three Brothers' applications at issue, as Two Brothers' cited applications were filed after Three Brothers' applications.

8. Three Brothers admits that it filed the trademark applications listed in paragraph 8 of the Notice of Opposition in the classes listed. Three Brothers denies that the referenced applications in any way conflict with any trademark rights held by Two Brothers.

9. Three Brothers objects to the "TWO BROTHERS mark" as defined in paragraph 7 of the Notice of Opposition. Three Brothers admits that it had knowledge of the existence of Two Brothers and of Registration No. 2,219,407 prior to filing Applications Nos. 86/021,014 and 86/020,720. Three Brothers expressly denies any direct or implied allegation that Three Brothers wilfully infringed Two Brothers' trademark rights. Any remaining allegations contained in Paragraph 9 of the Notice of Opposition are denied.

10. Three Brothers denies that it needed authorization from Two Brothers to adopt and/or register the 3 BROTHERS trademark. Further, Three Brothers denies the allegations contained in the second sentence of Paragraph 10 of the Notice of Opposition.

11. The allegations contained in Paragraph 11 of the Notice of Opposition are denied.

12. The allegations contained in Paragraph 12 of the Notice of Opposition are denied.

13. The allegations contained in Paragraph 13 of the Notice of Opposition are denied.

14. Any allegations set forth in the Notice of Opposition not expressly admitted are hereby denied.

#### **General and Affirmative Defenses**

15. Notwithstanding Two Brothers alleged common law trademark rights in the name TWO BROTHERS and/or any federal trademark registrations and/or applications owned by Two Brothers, there is no likelihood of confusion between the marks TWO BROTHERS and 3

BROTHERS. TWO BROTHERS is an inherently weak mark and 3 BROTHERS is not confusingly similar in commercial impression with TWO BROTHERS.

16. The term TWO BROTHERS is highly diluted as a trademark formative, and hence weak, and Two Brothers' purported rights extend no further than the specific marks Two Brothers alleges it owns, none of which are the same or confusingly similar to Three Brothers' mark in terms of connotation, appearance and/or pronunciation. Further, the name TWO BROTHERS is weak because it is not a famous mark in the context of Two Brothers' use of such mark.

17. Three Brothers' use of its mark will not mistakenly be thought by the public to derive from the same source as Two Brothers' goods, nor will such use be thought by the public to be a use by Two Bothers or with Two Brothers' authorization or approval.

18. Three Brothers' mark is sufficiently distinctively different from Two Brothers' marks to avoid confusion, deception or mistake as to the source or sponsorship or association of Three Brothers' goods. Three Brothers' mark is not likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of Three Brothers with Two Brothers, or as to the origin, sponsorship, or approval of Three Brother's goods by Two Brothers.

19. Three Brothers has lawfully used the mark 3 BROTHERS, such that, if the Board found likelihood of confusion between the marks 3 BROTHERS and TWO BROTHERS, Two Brothers' Applications Nos. 86123386 and 86123339, which seek nationwide trademark protection, could not be granted.

20. In the event that Federal Trademark Registration No. 2,319,407, is not cancelled on the basis of abandonment, as set forth in the counterclaim below, its overall commercial

impression does not conflict with Three Brothers' mark and there is no likelihood of confusion between that mark and the 3 BROTHERS mark.

### **COUNTERCLAIM**

#### **Petition to Cancel Registration No. 2,319,407**

21. Federal Trademark Registration No. 2,319,407 is invalid by reason of abandonment.

22. Federal Trademark Registration No. 2,319,407 is the only federal trademark registration which is owned by or has been assigned to Two Brothers having the literal elements "Two Brothers" or "Two Brothers Brewing Company".

23. Federal Trademark Registration No. 2,319, 407 is a logo mark and no character mark application for the character mark TWO BROTHERS was filed concurrently with Registration No. 2,319,407 or thereafter until an application for the mark "Two Brothers Brewing Company" was filed on November 19, 2013 (Application no. 86123339).

24. Upon information and belief, Two Brothers ceased use of the Registration No. 2,319,407 logo mark on or before 2009, and began using a substantially different logo which featured a depiction of two male heads leaning over a cup of beer, with each head and the cup of beer in a circular shape, so that the overall logo was similar to a clover shape, and which further included the signatures of Jason and Jim Ebel. (See Exhibit A to the Notice of Opposition).

25. Upon information and belief, on or before 2010, Two Brothers then began using another substantially different logo, the same or similar to the logo mark which is the subject of Application No. 8613386, which uses a rectangular shaped logo containing the words Two Brothers Brewing Co. and a circle containing a two-toned swirl. (See Notice of Opposition, Paragraph 5).

26. The two logos used by Two Brothers since at least 2009, including the logo set forth in Application No. 86123386, are substantially different in commercial impression than the Registration No. 2,319,407 logo mark and are not a continuation of use of that mark.

27. It has been at least three years since Two Brothers has used the mark covered by Registration No. 2,319,407, which is prima facie evidence that the Registration No. 2,319,407 logo mark is and has been abandoned.

28. Two Brothers' federal trademark rights are therefore abandoned.

29. Two Brothers therefore does not have any valid Federal Trademark registrations. WHEREFORE, Three Brothers respectfully requests that this opposition proceeding be dismissed, with prejudice, or, in the alternative, that Registration No. 2,319,407 be canceled.

Dated: February 24, 2014.

Respectfully submitted,

THREE BROTHERS BREWING, LLC

By Counsel

/s/Daniel L. Fitch/

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 24, 2014, I served a true and correct copy of the foregoing ANSWER AND COUNTERCLAIM on counsel for Opposer by U.S. Mail at the following address:

Thomas L. Holt, Esq.  
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By: /s/Daniel L. Fitch/  
Attorney for Applicant Three  
Brothers Brewing, LLC

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